(2)

No. 89-216

Supreme Court, U.S.
FILED
OCT 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN F. LAVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General
DOUGLAS N. LETTER
DWIGHT G. RABUSE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTION PRESENTED

Whether petitioner, who was convicted of conspiracy to introduce adulterated and misbranded apple juice into interstate commerce, was entitled to a judgment of acquittal on the ground that the suppliers of the concentrate used to make the juice intended to mislead petitioner's company about the nature of the concentrate.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	7

TABLE OF AUTHORITIES

Case:

United States v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976) 6

Statutes:

Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*:

21 U.S.C. 331(a)	2, 4
21 U.S.C. 331(k)	4
21 U.S.C. 333(b)	4
21 U.S.C. 342(b)	2
21 U.S.C. 342(b)(1)	2
21 U.S.C. 342(b)(2)	2
18 U.S.C. 371	2
18 U.S.C. 1341	2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-216

JOHN F. LAVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A78) is reported at 871 F.2d 1181. The opinion of the district court (Pet. App. A80-A121) is reported at 659 F. Supp. 1487.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on March 29, 1989. A petition for rehearing was denied on June 8, 1989 (Pet. App.

A79). The petition for a writ of certiorari was filed on August 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to introduce misbranded apple juice product into interstate commerce, in violation of 18 U.S.C. 371; 18 counts of mail fraud, in violation of 18 U.S.C. 1341; and 429 counts of introducing adulterated and misbranded apple juice into interstate commerce, in violation of 21 U.S.C. 331(a) and 342(b)(1) and (2). He was sentenced to concurrent terms of imprisonment for one year and one day, he was fined a total of $100,000, and he was ordered to pay the costs of prosecution. The court of appeals affirmed in part and reversed in part. Pet. App. A3-A78.

1. Petitioner is the former vice-president in charge of operations of the Beech-Nut Nutrition Corporation. In that capacity, he was responsible for purchasing and processing the apple juice concentrate used in Beech-Nut products. Beech-Nut labelled, advertised, and marketed its apple juice as pure fruit juice, free from sugar additives. Pet. App. A6-A7.

In 1977, the Universal Juice Company became Beech-Nut's sole supplier of apple juice concentrate. One year later, Dr. Jerome LiCari, Beech-Nut's director of research and development, became aware that the Universal concentrate might be adulterated.[1]

---

[1] A food is deemed to be adulterated within the meaning of 21 U.S.C. 342(b) if "any valuable constituent has been in whole or in part omitted or abstracted therefrom" or "any substance has been substituted wholly or in part therefor."

LiCari reported that information to petitioner, who dispatched two employees to inspect Universal's blending facilities. The inspection revealed that although Universal maintained a warehouse, it had no blending facilities. Pet. App. A7-A8. Following that discovery, petitioner did not stop using Universal as Beech-Nut's supplier of concentrate. Instead, he required Universal to give Beech-Nut a "hold harmless" agreement, designed to protect Beech-Nut against potential legal claims concerning the content of the juice. *Ibid.*

LiCari continued to warn petitioner that the Universal concentrate might be adulterated. Petitioner insisted, however, that because the Universal concentrate was far less expensive than other concentrates, he would not change suppliers unless test results proved, in a court of law, that the Universal product was adulterated. Petitioner also ordered LiCari to assign a low priority to any future testing of the concentrate. Pet. App. A8-A9.

In 1979, outside laboratory tests confirmed that certain lots of the Universal concentrate consisted primarily of corn syrup, rather than apple juice. Petitioner learned of those tests, but took no action. Thereafter, a Beech-Nut plant manager informed petitioner that 95,000 pounds of Universal concentrate in the Beech-Nut inventory was adulterated, and he suggested that the company demand its money back. Instead, petitioner directed the plant manager to use the adulterated concentrate in Beech-Nut mixed juices. Pet. App. A9-A10.

On many other occasions, petitioner was advised that the Universal concentrate was not apple juice. Following one such warning, petitioner threatened to fire LiCari. In 1981, Beech-Nut received an un-

solicited report from a Swiss laboratory, stating that the Company's apple juice product was not only adulterated, but in fact contained no apple juice. Petitioner continued to use Universal as a supplier. Pet. App. A10-A11.

In June 1982, petitioner was visited by a detective employed by the Processed Apple Institute. The detective informed petitioner that Beech-Nut would soon be involved in a lawsuit that would expose the Company's use of adulterated concentrate. Only then did petitioner terminate Universal as Beech-Nut's supplier. In addition, petitioner ordered that the concentrate in Beech-Nut's New York facilities be destroyed or returned to Universal; however, he also ordered the Company's San Jose, California, facility to continue using its adulterated concentrate for making Beech-Nut apple juice products. Pet. App. A12-A13.

2. In November 1986, Beech-Nut, its president, Niels L. Hoyvald, petitioner, and the concentrate suppliers were indicted in the Eastern District of New York on charges relating to Beech-Nut's sales of misbranded and adulterated apple juice. Pet. App. A17-A18. Count 1 of the indictment alleged that Beech-Nut and its officers, including petitioner, had conspired with the concentrate suppliers to violate the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 331(a) and (k), 333(b), by introducing adulterated and misbranded foods into interstate commerce. Pet. App. A83-A84.

Before trial, petitioner moved to dismiss Count 1 on the ground that it improperly alleged multiple conspiracies—one conspiracy involving the suppliers' attempt to defraud Beech-Nut by selling it adulterated and misbranded concentrate, and a second con-

spiracy among Beech-Nut officials to defraud consumers through the sale of adulterated and misbranded apple juice. Pet. App. A87-A88. The district court denied the motion, concluding that Count 1 alleged "a single conspiracy with multiple objects." *Id.* at A89. At trial thereafter, the court refused to instruct the jury that petitioner could not be convicted of conspiring with the suppliers if the jury found that the suppliers sought to defraud Beech-Nut. *Id.* at A40.

3. The court of appeals reversed petitioner's FFDCA convictions on venue grounds, but it affirmed his convictions on the mail fraud and conspiracy counts. Pet. App. A3-A78. The court explained that the "matter of whether the evidence has established one conspiracy or more than one is a question of fact for a properly instructed jury." *Id.* at A38. In the present case, the court held, the jury was properly instructed on the differences between multiple and single conspiracies. *Id.* at A39-A40. Moreover, the court stated, there was sufficient evidence to support the conspiracy conviction, notwithstanding petitioner's contention that Universal had sought to defraud Beech-Nut. In particular, the court noted, petitioner had refused "to heed the warnings of Beech-Nut's own staff"; he had directed his scientific staff "to make analysis of the concentrate a low priority item"; and he had known that Beech-Nut "was paying substantially less for the concentrate it bought from [Universal] than it had for the concentrate previously obtained from reputable suppliers." *Id.* at A40-A41. The court concluded that even if Beech-Nut and its officers (including petitioner) and the suppliers " 'were eager to cheat each other for a large slice of the spoils,' " that fact did not " 'obscure the

unifying means used by all of them to defraud the public.' " *Id.* at A40.

ARGUMENT

Petitioner contends (Pet. 6-9) that Universal intended to defraud Beech-Nut about the nature of the concentrate, and that, as a result, there could not be a single conspiracy between Beech-Nut and its suppliers. Rather, in petitioner's view, there were *two* conspiracies, one among the concentrate suppliers to defraud Beech-Nut and another involving petitioner and other Beech-Nut officials to defraud the public.

That contention is meritless. "The question whether there are one or more conspiracies is primarily for the jury, since it is a question of fact as to the nature of the agreement." *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976). In the present case, the jury was properly instructed on the law. Moreover, there was plainly sufficient evidence to support the jury's finding that petitioner conspired with the concentrate suppliers. For example, although petitioner was repeatedly warned that Universal was selling adulterated concentrate to Beech-Nut, he actively discouraged efforts to test the concentrate. He also ordered additional purchases of the product, and he continued to sell Beech-Nut products labelled "pure apple juice" even after he learned that those products were made from a sugar-syrup concentrate. In addition, the substantial savings attributable to using the cheap, bogus concentrate gave petitioner a significant financial stake in the continued success of the venture.

Finally, even if, as petitioner contends, Universal intended to defraud Beech-Nut with respect to the content of the concentrate, that would not preclude the suppliers and Beech-Nut from reaching an agree-

ment to defraud the public. As the court of appeals noted, "coconspirators need not agree on [all of the] details of [the] conspiracy," as long as the "essential nature of [the] plan is agreed on." Pet. App. A38. In the present case, the jury could easily have concluded that, whatever their original intentions, the suppliers and Beech-Nut both understood the true nature of the concentrate and agreed to market the final product to an unsuspecting public as pure apple juice.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

DOUGLAS N. LETTER
DWIGHT G. RABUSE
Attorneys

OCTOBER 1989

---

[2] Petitioner notes in passing (Pet. 8 n.12) that his challenge to the conspiracy conviction applies "somewhat differently" to the mail fraud convictions. For similar reasons, however, petitioner's challenge to the mail fraud counts is meritless. Even if, as petitioner suggests, Universal initially hoped to mislead Beech-Nut about the concentrate, there is no reason why the suppliers and Beech-Nut could not ultimately formulate a common "scheme or artifice to defraud" (18 U.S.C. 1341) the public about the final product.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 836